



## STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended	09/09/03	Bill No:	SB 20
Tax:	Covered Electronic Waste Recycling Fee	Author:	Sher and Romero
Board Position:		Related Bills:	

***This analysis will only address the bill's provisions that impact the Board.***

### **BILL SUMMARY**

This bill would:

- Establish the covered electronic waste recycling fee and require a retailer selling a covered electronic device to a consumer to collect the covered electronic waste recycling fee from the consumer in specified amounts,
- Authorize the Integrated Waste Management Board (IWMB) to solicit and use any and all expertise available in other state agencies, including, but not limited to, the State Board of Equalization (Board), and
- Authorize the IWMB to contract with the Board or another party for the collection of the covered electronic waste recycling fee.

### **Summary of Amendments**

Among other things, the amendments to this bill since the previous analysis delete the electronic waste recycling fee, which would have required a manufacturer of a hazardous electronic device to either prepare and submit a hazardous electronic waste recycling plan or remit to the IWMB the electronic waste recycling fee on each hazardous electronic device sold by the manufacturer in the state, as specified.

### **ANALYSIS**

#### **Current Law**

Under existing law, there is no fee on the hazardous electronic devices sold in this state.

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**Proposed Law**

This bill would add Chapter 8.5 (commencing with Section 42460) to Part 3 of Division 30 of the Public Resources Code as the Electronic Waste Recycling Act of 2003.

**COVERED ELECTRONIC WASTE RECYCLING FEE**

This bill would impose, on and after July 1, 2004, a covered electronic waste recycling fee upon the first sale in the state of a covered electronic device to a consumer by a retailer. A retailer selling a covered electronic device to a consumer would be required to collect a covered electronic waste recycling fee from the consumer for each covered device sold by the retailer in the following amounts:

- Six dollars (\$6) for each covered electronic device with a screen size of less than 15 inches measured diagonally.
- Eight dollars (\$8) for each covered electronic device with a screen size greater than or equal to 15 inches but less than 35 inches measured diagonally.
- Ten dollars (\$10) for each covered electronic device with a screen size greater than or equal to 35 inches measured diagonally.

The covered electronic waste recycling fee would be transmitted to the IWMB in accordance with a schedule and procedure that the IWMB establishes pursuant to proposed Sections 42475 and 42475.2.

Section 42475 would, among other things, authorize the IWMB to adopt any regulations, as specified, which are necessary to implement the Electronic Waste Recycling Act of 2003. The IWMB and the Department of Toxic Substances Control (DTSC) would be authorized to solicit and use any and all expertise available in other state agencies, including, but not limited to, the DTSC, the Department of Conservation, and the Board.

Section 42475.2 would authorize the IWMB and the DTSC to adopt regulations to implement the Electronic Waste Recycling Act of 2003 as emergency regulations.

A retailer selling a covered electronic device would be allowed to retain 3 percent of the covered electronic waste recycling fee as reimbursement for any costs associated with the collection of the fee.

The IWMB, in collaboration with the DTSC, would be required to review the covered electronic waste recycling fee on and after July 1, 2005, and at least every two years thereafter. Adjustments to the fee would be made to ensure that there are sufficient revenues to fund the covered electronic waste recycling program, which this bill would establish. The IWMB would base any adjustment of the covered electronic waste recycling fee on the both of following factors:

- The sufficiency, and any surplus, of revenues in the account to fund the collection, consolidation, and recycling of 100 percent of the covered electronic waste that is projected to be recycled in the state.
- The sufficiency of revenues in the account for the IWMB and the DTSC to administer, enforce, and promote the covered electronic waste recycling program, plus a prudent reserve not to exceed 5 percent of the amount in the account.

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This bill would authorize the IWMB to collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. The Fee Collection Procedures Law was added to the Revenue and Taxation Code to allow bills establishing a new fee to be collected by the Board to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund and appeals provisions, as well as provides the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

However, the IWMB would be authorized to contract with the Board or another party for collection of the covered electronic waste recycling fee.

#### **FINANCIAL PROVISIONS**

The covered electronic waste recycling fee would be deposited into the Electronic Waste Recovery and Recycling Account (Account), which this bill would create in the Integrated Waste Management Fund. The funds in the Account would be available for expenditure by the IWMB and the DTSC, upon appropriation by the Legislature, for the following purposes:

- To make electronic waste recycling payments to an authorized collector of covered electronic waste.
- To make electronic waste recycling payments to covered electronic waste recyclers of covered electronic waste.
- To provide for costs of the IWMB and the DTSC to administer the Electronic Waste Recycling Act of 2003.
- To provide funding to the DTSC to implement and enforce hazardous waste control laws, as described.

#### **DEFINITIONS**

This bill would define the following terms:

- "Retailer" - a person who sells a covered electronic device in the state to a consumer but who did not manufacture the device. "Retailer" would include a manufacturer of a covered electronic device who sells that covered electronic device directly to a consumer through any means, including, but not limited to, transactions conducted through sales outlets, catalogs, or the Internet, or any other, similar electronic means, but would not include a sale that is a wholesale transaction with a distributor or retailer.
- "Sell" or "sale" - any transfer for consideration of title or of the right to use, by lease or sales contract, including, but not limited to, transactions conducted through sales outlets, catalogs, or the Internet, or any other, similar electronic means, but would not include a wholesale transaction with a distributor or a retailer.

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- "Covered electronic device" - a cathode ray tube, cathode ray tube device, flat panel screen, or any other similar video display device with a screen size that is greater than four inches in size measured diagonally and which the DTSC determines, when discarded or disposed, would be a hazardous waste, as specified.

A "covered electronic device" would not include an automobile or a large piece of commercial or industrial equipment, including, but not limited to, commercial medical equipment, that contains a cathode ray tube, cathode ray tube device, flat panel screen, or other similar video display device that is contained within, and is not separate from, the larger piece of industrial or commercial equipment.

- "Consumer" - a purchaser or owner of a covered electronic device. "Consumer" would also includes a business, corporation, limited partnership, nonprofit organization, or governmental entity, but does not include an entity involved in a wholesale transaction between a distributor and retailer.

"Consumer" would not include a manufacturer who purchases specialty or medical electronic equipment, as defined, that is a covered electronic device.

#### **MISCELLANEOUS**

The bill would become operative January 1, 2004.

#### **Background**

In 2002, Senator Sher introduced Senate Bill 1523, which would have placed a \$10 advanced recycling fee on the sale of all new CRTs sold in California. Senate Bill 1523 passed both houses of the Legislature, but was vetoed by the Governor. In his veto statement, Governor Davis said he would rather see California legislation modeled after the product stewardship approach in the European Union, and that he was willing to sign legislation in 2003 that "challenges industry to assume greater responsibility for the recycling and disposal of electronic waste." The veto statement also stated: "I challenge the industry to lead the way and devise an innovative solution for the source reduction, recycling and safe disposal of electronic waste . . . Moreover, we simply must demonstrate our leadership and compassion by making sure that California's electronic waste is not irresponsibly sent to underdeveloped nations." In response to the Governor's challenge, Senator Sher introduced Senate Bill 20.

#### **In General**

According to information from the IWMB and DTSC websites: "E-waste is a popular, informal name for electronic products nearing the end of their 'useful life.' Computers, televisions, VCRs, stereos, copiers, and fax machines are common electronic products. Many of these products can be reused, refurbished, or recycled. Unfortunately, electronic discards is one of the fastest growing segments of our nation's waste stream. In addition, some researchers estimate that nearly 75 percent of old electronics are in storage, in part because of the uncertainty over how to manage the materials.

"The term "E-waste" is loosely applied to consumer and business electronic equipment that is near or at the end of its useful life. There is no clear definition for E-waste; for

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instance, whether or not items like microwave ovens and other similar "appliances" should be grouped into the category have not yet been determined. Certain components of some electronic products contain materials that render them hazardous, depending on their condition and density. For instance, California regulation currently views nonfunctioning CRTs (cathode ray tubes) from televisions and monitors as hazardous.

"CRTs, often called "picture tubes," convert an electronic signal into a visual image. A typical CRT contains between two and five pounds of lead. Lead is a toxic substance which may cause lead poisoning and can be especially harmful to young children. If products containing lead are disposed of to the trash, the lead can potentially contaminate the soil and our water supplies. When tested, most CRT's exceed the regulatory threshold for lead and are identified as hazardous waste when discarded. "

## COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to enact a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of hazardous electronic devices.
2. **Key amendments.** The **September 9, 2003**, amendments revise the operative date of the covered electronic waste recycling fee. The remaining amendments do not appear to impact the Board.

The **September 5, 2003**, amendments to this bill, in part, delete the electronic waste recycling fee, which would have required a manufacturer of a hazardous electronic device to either prepare and submit a hazardous electronic waste recycling plan or remit to the IWMB the electronic waste recycling fee on each hazardous electronic device sold by the manufacturer in the state, as specified.

Among other things, the **July 29, 2003**, amendments add, delete and revise definitions, add an electronic waste collection fee, and revise the bill's financial provisions.

The **June 2, 2003**, amendments delete the provision that would have declared that the bill take effect immediately as an urgency statute.

The **May 21, 2003**, amendments that could impact the Board declare that the bill would take effect immediately as an urgency statute and make other technical corrections.

The **May 6, 2003**, amendments require a manufacturer of a hazardous electronic device to remit to the IWMB a hazardous electronic device recycling and recovery fee on each hazardous electronic device sold by the manufacturer in the state, as specified. This bill would also authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Board.

3. **Could the state require out-of-state retailers to remit a covered electronic waste recycling fee?** Various Supreme Court cases have focused on states' ability to impose the use tax on out-of-state firms making sales to in-state customers. In 1967 the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois Department of*

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Revenue, 386 U.S. 753 (1967), that a firm that has no link to a state except mailing catalogs to state residents and filling their orders by mail cannot be subject to that state's sales or use tax. The Court ruled that these mail order firms lacked substantial physical presence, or nexus, required by the Due Process Clause and the Commerce Clause of the United States Constitution.

In the 1977 case of *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 {51 L.Ed.2d 326, 97 S.Ct. 1076} the Court articulated that, in order to survive a Commerce Clause challenge, a tax must satisfy a four part test: 1) it must be applied to an activity with a substantial nexus with the taxing State, 2) it must be fairly apportioned, 3) it does not discriminate against interstate commerce, and 4) it must be fairly related to the services provided by the State.

North Dakota enacted anti-National Bellas Hess legislation with the expressed purpose of creating nexus with mail order firms selling to consumers in the state, in an attempt to compel out-of-state retailers to collect the use tax on mail order sales and test the continuing validity of the National Bellas Hess decision. The statute was challenged, and in 1992 the Supreme Court issued a ruling in *Quill Corporation v. North Dakota* (1992) 504 U.S. 298. The Court in *Quill* applied the *Complete Auto Transit* analysis and held that satisfying due process concerns does not require a physical presence, but rather requires only minimum contacts with the taxing state. Thus when a mail-order business purposefully directs its activities at residents of the taxing state, the Due Process Clause does not prohibit the state's requiring the retailer to collect the state's use tax. However, the Court held further that physical presence in the state was required for a business to have a "substantial nexus" with the taxing state for purposes of the Commerce Clause. The Court therefore affirmed that in order to survive a Commerce Clause challenge, a retailer must have a physical presence in the taxing state before that state can require the retailer to collect its use tax.

Based on the above cases, it is questionable whether the state could require an out-of-state manufacturer of a covered electronic device, who has no physical presence in California, to remit a fee in order for that device to be sold to a consumer in this state. Further, it should be noted that this bill would define a "retailer" to mean a person who sells a covered electronic device in this state. Based on that definition, it is unclear if the restrictions would apply to an out-of-state retailer that has no physical presence in the state, since without a physical presence it is possible that a sale of the device that ends up in California would not have been made by the retailer in this state.

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4. **Petitions for redetermination and claims for refund.** It is suggested that, for purposes of the covered electronic waste recycling fee, the IWMB handle the petitions for redetermination and approve the claims for refund based upon the grounds that the IWMB improperly or erroneously calculated the amount of the fee or identified the wrong feepayer. It would be difficult for Board staff to resolve feepayer protests and claims based on actions of another state agency, and doing so could result in a significant number of additional appeals conferences and Board hearings. Accordingly, the following language is suggested:

42464.5. (a) If the board contracts with the State Board of Equalization to collect the fee imposed in Section 42464, the State Board of Equalization may collect that fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code).

(b) No petition for redetermination of fees determined by the board pursuant to Section 42464 shall be accepted or considered by the State Board of Equalization if the petition is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42464(e) or has incorrectly determined that the person is subject to the fee. Any appeal of a determination based on the grounds that the amount of the fee was improperly or erroneously calculated or that the person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

(c) No claim for refund of fees paid pursuant to Section 42464 shall be accepted or considered by the State Board of Equalization if the claim is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42464(e) or has incorrectly determined that the person is subject to the fee. Any claim for refund based on the grounds that the amount of the fee was improperly or erroneously calculated or that the person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

It is also suggested that the bill specify a due date for the fee and authorize the payment of refunds on overpayments of the fee.

5. **Overriding federal government or court actions.** Proposed Section 42485 would prohibit the IWMB or the DTSC from implementing the Act if federal law changes, as provided, or a court holds that the law is invalid. However, the proposed section does not indicate what would occur should the Act be implemented prior to a change in federal law or court action. Would the provisions of the Act cease to be effective in such a case? If that is the author's intent, Section 42485 should be amended to cover the cessation of the Act in the event the contingencies occur in the future. For example, the bill should provide for what would happen to the amounts on deposit in the Electronic Waste Recovery and Recycling Account, and address how refunds would be made.

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6. **Other technical concerns.** Board staff is working with the author's office in drafting appropriate amendments to address the following concerns:

- The term "retailer" is defined as a person who sells a hazardous electronic device in the state to a consumer but who did not manufacture the device. As such, the term "person" should be defined.
- Section 42464.2 provides that the IWMB could collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law. However, the IWMB cannot simply use the Fee Collection Procedures Law to collect the fee since that law is a collection mechanism specific to the Board. The subdivision goes on further to provide that the IWMB may contract with the Board or another party for the collection of one or more of the fees due under this "section" (Section 42464.2). However, Section 42464.2 does not impose any fee. In addition, Section 42464.2 would not specifically authorize the Board to collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law if the IWMB elects to contract with the Board for collection of the fee. The following language is suggested to address these concerns:
- Section 42464.2 provides that the IWMB "may collect the fees imposed pursuant to this section pursuant to the Fee Collection Procedures Law". Since there are no fees imposed under Section 42464.2, it appears that "section" was inadvertently used instead of "article" or "part". It is therefore recommended that Section 42464.2 be amended to correct this drafting error. In addition, the Fee Collection Procedures Law, which is located in the Revenue and Taxation Code, specifically applies to collection of taxes and fees by the Board of Equalization. Accordingly, the reference to that law should be moved to the second sentence of Section 42464.2 in which the Board (of Equalization) is referenced. The amendments should also specifically authorize the Board (of Equalization) to collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law, if the IWMB elects to contract with the Board for collection of that fee. The following language is suggested to address these concerns:

~~42464.2. The board may collect the fees imposed pursuant to this section pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The board may contract with the State Board of Equalization or another party for collection of fees due under this articlesection. If the board contracts with the State Board of Equalization to collect the fee under the article, the State Board of Equalization may collect that fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code).~~

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**COST ESTIMATE**

This bill does not increase administrative costs to the Board because it only authorizes the IWMB to contract with the Board to collect the covered electronic waste recycling fee. The IWMB would be required to contract with the Board to perform collection functions related to that fee, and reimburse the Board for its preparation costs to administer that fee as well as the ongoing costs for the Board's services in actually administering the covered electronic waste recycling fee.

The Board would incur non-absorbable costs to adequately develop and administer a new fee program if the IWMB were to contract with the Board to collect the proposed fee. These costs would include registering fee payers, developing computer programs, mailing and processing returns and payments, conducting audits, developing regulations, training staff, and answering inquiries from the public. A cost estimate of this workload is pending.

**REVENUE ESTIMATE****Background, Methodology, and Assumptions**

This bill would define covered electronic devices as a cathode ray tube, cathode ray tube device, flat panel screen, or any other similar video display with a screen size that is greater than four inches in size measured diagonally and which, when discarded or disposed, would be a hazardous waste.

This measure would impose a fee on the sales of covered electronic devices that are less than 15 inches, greater than or equal to 15 inches but less than 35 inches, and 35 inches and greater operative on or after July 1, 2004. The fees for each size group are \$6 per device, \$8 per device, and \$10 per device, respectively. Additionally, on and after July 1, 2005, and at least once every two years thereafter, the IWMB would be required to review, at a public hearing, the covered electronic waste recycling fee and make any adjustments to the fee to ensure that there are sufficient revenues in the account to fund the covered electronic waste recycling program.

According to a study compiled by the IWMB, titled "Selected E-Waste Diversion in California: A Baseline Study," the projected sales in California for devices defined as covered electronic devices are 8.74 million. Based upon U. S. sales data presented by the Electronic Industries Alliance, Board staff was able to determine the percentage of devices sold by size in inches proposed in this bill. Those percentages were applied to the IWMB's projected sales of qualifying devices.

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**Revenue Summary**

Based on the number of devices projected to be sold in California for 2002, and the fee structure proposed by this bill, the estimated covered electronic device recycling fees to be collected are as follows:

Fee Category	Percentage of Devices Sold	Estimated Devices Sold in 2002 (in millions)	Fee per Device	Fee Total (in millions)
Less than 15"	6.4	.559	\$6	\$ 3.4
15" to 34"	92.0	8.04	\$8	\$ 64.3
35" and greater	1.6	.140	\$10	\$ 1.4
Total	100.0	8.74		\$ 69.1

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